No. 48935-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DALE SMITH,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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II. STATEMENT OF THE CASE

On January 1, 2016, around 2:45 a.m., several law enforcement officers were dispatched to a residence on Jackson Highway, in Lewis County, to assist emergency medical personnel with a combative subject. RP 27-29, 51, 54, 77-78. Emergency medical personnel had been summoned to the residence because Smith, a friend of one of the homeowners, Collins, had passed out in the bathroom and had been unresponsive. RP 104.

Toledo Police Officer Scrivner was the first law enforcement officer to arrive on the scene. RP 29-30. Officer Scrivner went inside the residence and found Smith sitting on the couch with Collins, surrounded by several fire personnel, who were talking to Smith. RP 29-30. Officer Scrivner observed Smith appeared rather intoxicated. Officer Scrivrner could smell an odor of intoxicants coming from Smith and Collins. RP 31. Officer Scrivner attempted to talk Smith into voluntarily going to the hospital for treatment out of concern for

his intoxication level. RP 30. Officer Scrivner was not successful. RP 31.

Deputy Schlecht[1] and Deputy Andersen arrived on the scene a short time after Officer Scrivner arrived. RP 31. Smith immediately recognized Deputy Schlecht, seemed happy to him, said his name, and started shaking his hand. RP 55. Because Deputy Schlecht had a more personal relationship with Smith, Officer Scrivner decided to step back and let Deputy Schlecht handle matters. RP 31.

All law enforcement officers observed that Smith was very intoxicated. RP 30, 56, 79. Smith had urinated in his pants. RP 30, 56. Smith's speech was slurred. RP 30, 79. Smith's eyes were red, bloodshot, and watery. RP 79. Smith was also having mood swings. RP 39, 57, 80.

Deputy Schlecht spoke to fire personnel and Collins' wife. RP 56. Collins' wife told Deputy Schlecht Smith was making suicidal statements, he wanted to get a gun and end his life, and he also talked about using his deceased mother's morphine pills to end his life. *Id*. Deputy Schlecht was concerned by these statements because he knew Smith to carry firearms. Deputy Schlecht asked

[1] Deputy Schlecht testified that he just made the rank of Detective prior to this trial. Because the charging information, jury instructions, and other participants refer to Detective Schlecht as Deputy Schlecht the State will refer to him as Deputy in this brief.

Smith if he had his firearm with him, and was told by Smith it was in his truck. *Id*. Deputy Schlecht recognized Smith's truck parked out in the driveway. *Id*.

Deputy Schlecht attempted to calm down Smith. RP 57. Deputy Schlecht talked to Smith, attempting to get Smith to voluntarily go to the hospital for some treatment. RP 57. Deputy Schlecht wanted Smith to agree to go to the hospital because of Smith's intoxication level and his statements of self-harm. RP 57.

Smith voluntarily agreed to go to the hospital and was escorted out of the house by Deputy Schlecht and Deputy Andersen. RP 57, 80-81. Smith wanted to walk out with the deputies, not with EMS personnel. RP 81. Deputy Andersen and Deputy Schlecht assisted Smith onto the gurney, seat-belted him in, raised it up, and started towards the ambulance. Smith became upset, said he did not want to go to the hospital, and started to undo the straps. RP 81. Smith was told that due to his suicidal statements he was not free to go, he was detained, and he had to go to the hospital to be evaluated under the involuntary treatment act. RP 57-58, 82.

Smith and Deputy Schlecht have another conversation and Smith again agrees to go to the hospital if he can urinate before he is transported. RP 34, 58, 82. Deputy Andersen and Deputy Schlecht

assist Smith to the bushes so he can urinate. RP 34, 59, 84. Once he is finished, Smith breaks free of Deputy Andersen and lunges towards Deputy Schlecht. RP 59, 84-85. Smith shoved his shoulder into Deputy Schlect's chest, mid-torso area. RP 35, 59. The force of the hit knocked Deputy Schlecht off balance. RP 62. Smith said, "Let me see that gun" and with both of his hands, grabbed Deputy Schlecht's gun. RP 35, 60, 84-85. Smith was grabbing up, trying to remove the gun from the holster, and was actually pulling up Deputy Schlecht's duty belt. RP 35, 59-60. Deputy Andersen and Officer Srivner grab Smith, eventually regaining control of him. RP 35, 60, 86.

On January 4, 2016 the State charged Smith by Information with one count of Assault in the Third Degree. CP 1-3. Smith elected to exercise his right to have his case tried to a jury. *See* RP. Although he had not asserted intoxication as a defense on the Omnibus Order, Smith requested a jury instruction for voluntary intoxication. RP 139; CP 16-17; 44-45. Smith was convicted as charged. CP 57. Smith was sentenced to 40 days, with the ability to serve his sentence on work release. CP 76. Smith timely appeals his conviction. CP 84-94.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT SMITH COMMITTED THE CRIME, ASSAULT IN THE THIRD DEGREE.

Contrary to Smith's assertion, the State presented sufficient evidence of Smith's intent to commit assault. Smith argues the State did not present sufficient evidence to sustain the jury's verdict of guilty for his conviction for Assault in the Third Degree because his voluntary intoxication showed he could not form the requisite intent. Brief of Appellant 6-22. This Court should find the State presented sufficient evidence to sustain the jury's guilty verdict for Assault in the Third Degree and affirm the conviction.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Is Required To Prove Each Element Beyond A Reasonable Doubt And The State Did Such, Therefore, Presenting Sufficient Evidence To Sustain The Jury's Verdict For Assault In The Third Degree.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a

reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Smith of Assault in the Third Degree, the State was required to prove, beyond a reasonable doubt, that Smith, on or about January 1, 2016, in the County of Lewis, (1) with the intent to prevent or resist a lawful process or mandate of any court officer or lawful detention or apprehension of himself or another person did assault another; and/or, (2) did intentionally assault a law enforcement officer or other employee of a law enforcement agency performing his official duties at the time of the assault. RCW 9A.32.031(1)(a); RCW 9A.56.031(1)(g); CP 1.

The to-convict instruction stated:

> To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about or between January 1, 2016, the defendant assaulted Deputy Mathew Schlecht;
>
> (2a) That the assault was committed with intent to prevent or resist the execution of a lawful process or mandate of a court officer or the lawful apprehension or detention of the defendant or another person; or
>
> (2b) That at the time of the assault Deputy Mathew Schlecht was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and;
>
> 4) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that elements (1), (3) and either alternative element (2a) or (2b) have been

> proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives (2a) or (2b) has been proved beyond a reasonable doubt, as long as each juror finds that either (2a) or (2b) has been proved beyond a reasonable doubt.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 64, *citing* WPIC 35.21; WPIC 35.23.02.

Therefore, the State had to prove an assault occurred. An assault is defined as,

> An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
> An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 65, *citing* WPIC 35.50. "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 66, *citing* WPIC 10.01.

Smith argues the State failed to prove the necessary element of intent. Brief of Appellant 10-22. While Smith spends some time in

his briefing discussing the alternative means by which the State chose to charge him under, ultimately, none of that is of consequence for his argument here. Brief of Appellant 7-10. Regardless of what prong the State charged Smith under, it must show Smith acted with intent, as assault is an intentional act. *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006); WPIC 35.50.

Smith makes a circular argument, he raised and the jury was instructed on voluntary intoxication, the officers felt he was extremely intoxicated, his extreme intoxication was one of the reasons the officers wished him to go to the hospital, therefore the State must have not proven its case beyond a reasonable doubt. Brief of Appellant 12-22. Smith appears to argue at times that the State ignored the *mens rea* of the crime of assault altogether, and at other times, appears to argue that because the officers believed Smith so intoxicated they were going to have him committed under the involuntary commitment statute which shows the State did not meet its burden to prove Smith acted intentionally. *Id.* Smith does not view the evidence in the light most favorable to the State with all reasonable inferences in favor of the State. *Goodman*, 150 Wn.2d at 781. In fact, Smith appears to ignore the evidence that is favorable

to the State. The State proved that Smith acted with intent when he assaulted Deputy Schlecht.

The State acknowledges Smith was able to raise the defense of voluntary intoxication. CP 67. Voluntary intoxication is a statutory defense that allows a trier of fact to assess the defendant's mental state, therefore it is only applicable to crimes which have a *mens rea*. RCW 9A.16.090; *State v. Coates,* 107 Wn.2d 882, 889-90, 735 P.2d 64 (1987). The statute states,

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090. Voluntary intoxication is not a defense to the crime, the defense allows the defendant to argue "the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state." *Coates*, 107 Wn.2d at 891.

Smith at length discusses that his level of intoxication reached the necessary level for Deputy Schlecht to determine Smith needed to be taken to the hospital against his will under the involuntary treatment act. Brief of Appellant 12-22; *See* RCW 70.96A.120(2). This must therefore, according to Smith, be clear evidence Smith

was gravely disabled and could not form the requisite mental intent to assault Deputy Schlecht. Smith ignores in his argument that both Deputy Schlecht and Deputy Andersen clearly state that Smith was being involuntarily committed under the act due to his suicidal statements. RP 57-58, 82, 91.

Smith could not have been committed under the involuntary treatment act, RCW 70.96A.120(2), for his intoxication level because that provision in the act requires the individual to be in a public place, which Smith was not. The relevant part of the statute states,

> …a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place or who has threatened, attempted, or inflicted physical harm on himself, herself, or another, shall be taken into protective custody by a peace officer…

RCW 70.96A.120(2).

Deputy Schlecht did testify that he was concerned about Smith's high level of intoxication and it was one of the reasons why he wanted Smith to go to the hospital. RP 67. Yet, when reviewing the testimony, in the light most favorable to the State, with all reasonable inferences in favor of the State, the only reason Smith was being involuntarily committed by law enforcement was due to his suicidal statements. Deputy Andersen explained they were

attempting to get Smith to go to the hospital voluntarily, but if not Deputy Andersen would be forced to take other action:

> We were encouraging him to seek medical attention on his own. If he had not agreed to go on his own, then with the statements he made to family and EMS, then I would have done the paperwork to do a mental health hold to get him evaluated by an emergency room physician that night.

RP 91. Deputy Schlecht testified,

> I was telling him he's going to the hospital because it's an involuntary treatment act. Basically he's unable to care for himself. He's made suicidal statements. He has means to carry out this threat, i.e., a firearm as well as he claims he had some pills of his mother's, morphine pills. So we explained to him that he needs to go to the hospital.

RP 57-58. Deputy Andersen testified,

> So we immediately lowered the stretcher as well as detained him on the stretcher and also advised him that due to his previous statements to family and EMS staff, that he was not able to leave because of the suicidal statements and that he needed to go to the hospital and be evaluated.

RP 82. Therefore, the evidence presented was that while Smith was intoxicated, his involuntary trip to the hospital was due to his suicidal statements.

The State does not deny there was ample evidence that Smith was intoxicated. Smith had slurred speech, red, watery eyes, smell of intoxicants, mood swings, Smith and Collin's testimony regarding

the copious amount of alcohol Smith consumed, and medical aid was summoned to the residence due to Smith passing out in the bathroom. This is why Smith was able to have the jury instructed on voluntary intoxication. The question then becomes, did the degree of Smith's intoxication effect his ability to form the requisite intent when he assaulted Deputy Schlecht? *See Coates*, 107 Wn.2d at 891.

Smith, while intoxicated, recognized Deputy Schlecht immediately, even remembering his name. RP 56. Smith was able to converse with the officers and medical personnel for some time. *See* RP. Smith then is able to place conditions for which he will voluntarily go to the hospital; he wants to urinate first. RP 58. Smith urinates in the bushes. RP 59. Then Smith breaks free of Deputy Andersen. RP 84. Smith states, "Let me see that gun" to Deputy Schlecht. RP 59, 84-85. At the same time Smith hits Deputy Schlecht with enough force, shoving his shoulder into Deputy Schlecht's chest, mid-torso area, to knock Deputy Schlecht off balance. RP 59, 62. Smith then uses both of his hands and grabs onto Deputy Schlecht's firearm and pulls with such force, attempting to remove it from its holster, that he is actually pulling up Deputy Schlecht's duty belt. RP 35, 59-6, 84-85.

Smith's actions show that he acted with requisite mental state, intent, when he assaulted Deputy Schelcht. Smith was not so intoxicated that he could not carry on a conversation with other persons. While he was very intoxicated and had mood swings, which appeared to contribute to his vacillating decision regarding voluntarily going to the hospital, this does not mean Smith was so intoxicated he could not act with the objective or purpose to accomplish a result that constituted the crime of assault. *See* WPIC 10.01; CP 66. Smith broke free from one deputy, turned, declared a desire for the other deputy's gun, and then with force, struck the deputy, and attempted to take the deputy's firearm. These actions, in totality, show Smith intentionally struck or touched Deputy Schlecht in a manner that was harmful or offensive. *See* WPIC 35.50; CP 65.

In the light most favorable to the State, with all reasonable inferences drawn in the State's favor, the required elements of Assault in the Third Degree have been proven beyond a reasonable doubt. Smith had the intent to assault Deputy Schlecht, his intoxication level did not negate the required mental state. Therefore, this Court should affirm Smith's conviction.

B. THE JURY INSTRUCTIONS DID NOT RELIEVE THE STATE FROM ITS BURDEN, FURTHER, SMITH CANNOT RAISE FOR THE FIRST TIME ON APPEAL ISSUES REGARDING JURY INSTRUCTIONS HE DID NOT PRESERVE BELOW BECAUSE THEY ARE NOT A MANIFEST CONSTITUTIONAL ERROR.

Smith claims the Court's instructions to the jury were confusing and relieved the State of its burden of proving the essential element of intent. Brief of Appellant 22-29. Smith claims that five jury instructions dealt with assault and intent and when taken together were confusing and relieved the State of its burden. *Id.* Specifically Smith complains to this Court about jury instructions Three, Four, Five, Six, and Seven. *Id.* The only jury instruction that Smith objected to was subpart (2a) of instruction four. RP 135, 144. Smith actually proposed two of the instruction he now complains to this Court about.

There is no error in the jury instructions which relieves the State of its burden. Any error in Instruction Six and Seven has been invited by Smith. The alleged error of instructions three, four,[2] and five are not manifest constitutional error. Error, if one exists, would be constitutional but Smith does not demonstrate to this Court how

[2] The State acknowledges Smith preserved error in regards to Instruction Four, subpart (2a), but only in regards to his argument that the jury should not be instructed as to this prong of Assault in the Third Degree.

the error is manifest. Therefore, Smith cannot raise this issue for the first time on appeal.

1. Standard Of Review.

A claim of a manifest constitutional error is reviewed de novo. *State v. Blancaflor,* 183 Wn. App. 215, 222, 334 P.3d 46 (2014). Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793, 802 (2012).

2. Smith Proposed Instructions Six And Seven, And Therefore Is Barred By Invited Error From Challenging Those Instructions On Appeal.

A party who sets up an error at trial is barred under the invited error doctrine from claiming that very action as an error on appeal and securing a new trial. *State v. Hood,* 196 Wn. App. 127, 131, 382 P.3d 710 (2016), *citing State v. Momah,* 167 Wn.2d 140 153, 217 P.3d 321 (2009), *cert denied,* 562 U.S. 837 (2010). "Thus, a party may not request a particular instruction and later complain on appeal that the instruction was given." *Hood*, 196 Wn. App. at 131, *citing State v. Studd,* 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). Even when instructional errors are of constitutional magnitude, the invited error doctrine precludes review. *Id.* at 131-32 (internal citation omitted).

Smith argues the Court's Instructions to Jury Six and Seven are part of the problematic instructions that relieved the State of its burden of proving the necessary element of intent. Brief of Appellant 27-29. Instruction Six is the standard WPIC for intent. WPIC 10.01; CP 66. Instruction Six states, "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 66. This is identical to the instruction Smith proposed as part of "DEFENDANT'S PROPOSED JURY INSTRUCTIONS." CP 46.

Instruction Seven was actually Smith's proposed jury instruction, which the State objected to. RP 139; CP 45, 67. Instruction Seven states, "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent." CP 67. The instruction was given exactly as proposed by Smith. CP 45.

Therefore, all of Smith's arguments in regards to Instructions Six and Seven are waived under the invited error doctrine. Smith may not complain of any issue in regards to these instructions, including if they potentially lowered the State's burden of proof. This Court

should disregard Smith's complaints of error for Instructions Six and Seven.

3. Smith Did Not Object To The Instructions And Fails To Show This Court That The Alleged Error Is A Manifest Constitutional Error.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id., citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted)*.

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine

whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id. (citations omitted)*. No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id*.

Smith's only objection during jury instructions was in regards to Instruction Four, part (2a). RP 135, 144. Smith's trial counsel stated in his objection,

> I would object to having 2A in there. I don't think there was any evidence present that he was - - the intent was to prevent or resist the execution of a lawful process or mandate of the court. He wasn't under custody at the time, and so I would just ask that that particular instruction be removed, because I think it could be confusing to the jury.

RP 135. Therefore, the only objection raised was in regards to there being insufficient evidence to present (2a) to the jury and having that portion of the instruction could be confusing. RP 135, 145.

a. Instructions Three, Four, and Five were not erroneous, as they did not relieve the State of its burdening of proving the required element of intent.

The State is not agreeing that Instructions Three, Four, and Five were erroneous. All of the instructions Smith complains to this Court contained the language in the standard WPICs. CP 63-65; WPIC 35.20; WPIC 35.21; WPIC 35.23.02; WPIC 35.50. Smith appears to argue that having to flip between different instructions makes it difficult and confusing to the jury to figure out what definitions it needs to apply when determining if Smith acted with the requisite intent. Brief of Appellant 23-27. Smith's argument is that the jury is incapable of reading the jury instructions as a whole, and that the to-convict instruction is something they must discover and figure out on their own volition, because it is the only thing which tells the jury the State must prove each and every element beyond a reasonable doubt. *Id.* This argument ignores the basic tenets of our jurisprudence and the facts of this case.

The jury instructions are to be considered in the context of the instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). The trial judge reads aloud to the jury all

of the jury instructions prior to the jury hearing closing arguments. RP 145-54. This includes reading Instruction Four, and all other instructions, in its entirety. RP 150-51. The deputy prosecutor, in her closing argument, highlighted Instruction Four, stating, "I'm going to point you to instruction No. 4. It's what the state must prove beyond a reasonable doubt in order for you to convict Dale Smith of assault in the third degree." RP 155. The deputy prosecutor then walks the jury through each of the elements of the to-convict instruction, and when she gets to the first element, which includes that Deputy Schelcht was assaulted, the deputy prosecutor discusses the definition of assault, that it is an intentional act. RP 155-57.

It is disingenuous to state the jury had no knowledge these other instructions defined the elements listed in the to-convict. The WPICs were written to have definitions of key terms, elements, in separate instructions from the to-convict, as evidence by the NOTE ON USE sections which lists all other WPICs one is to include when using an instruction. See e.g. WPIC 35.02 (Assault in the Frist Degree); WPIC 36.02 (Malicious Harassment); WPIC 70.02 (Theft in the First Degree). The Court's instructions to the jury were accurate, correct statements of the law. The jury instructions were not confusing. The jury understood, looking at Instruction Four, subpart

(1) the State must prove Smith assaulted Deputy Schlecht. CP 64. The definition of assault was found on the very next jury instructions, Instruction Five. CP 65. Instruction Five makes it clear that assault must be an intentional act. *Id.* The next instruction, Instruction Six defines intent. CP 66. The jury instructions did not relieve the State of its burden and the Court should find no error.

b. If the Instruction Three or Four were confusing and therefore erroneous neither were a manifest error.

While the State maintains throughout its argument that the jury instructions were not erroneous, arguendo, any error in Instruction Three or Four alleged by Smith, which made the instructions confusing by not clearly stating the element of intent in the instruction, which shifted the burden of proof, is an error of constitutional dimension as it violates the due process clause. *State v. Redwine*, 72 Wn. App. 625, 629, 865 P.2d 552 (1994) (citations omitted). Therefore, the analysis in this case must be focused on whether the alleged error is manifest.

An error is manifest if a defendant can show actual prejudice. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Actual prejudice requires a defendant to make a "plausible showing… that the asserted error had practical and identifiable consequences in the

trial of the case." *O'Hara*, 167 Wn.2d at 99 (internal citations and quotations omitted). Smith has not satisfied this requirement.

Absent his argument that the instructions shift the burden and violate due process, Smith fails to argue how he can raise this issue for the first time on appeal, let alone how the alleged error(s) is manifest. Brief of Appellant 22-29. Smith argues the jurors were not properly informed that the State had the burden of proving Smith, beyond a reasonable doubt, intended to commit assault, rather than had the intent to prevent or resist. *Id.* at 29. Yet, even if somehow Instruction Three and Four were somewhat confusing, Smith fails to acknowledge that the proper jury instruction defining assault and intent were given. CP 65-66. Instead, Smith argues these instructions, the standard WPICs aid in the confusion. Smith also does not acknowledge to this Court that jury instructions are viewed as a whole and this Court presumes juries follow the instructions. *Bennett*, 161 Wn.2d at 307; *State v. Ervin*, 158 Wn.2d at 756.

Smith must show he was actually prejudiced by the error. *State v. Knight*, 176 Wn. App. 936, 951, 309 P.3d 776 (2013). Smith has not, and cannot shown actual prejudice because the jury was properly instructed on the definition of assault and intent, which are referenced in the to-convict and definitional instructions for Assault

in the Third Degree. CP 63-66. The jury was correctly instructed that it had to find beyond a reasonable doubt that Smith assaulted Deputy Schlecht. CP 64. The definition of assault was included in the instructions, which stated assault was an intentional act. CP 65. The definition of intent was included in the instructions. CP 66. There is no showing of actual prejudice. Therefore, the alleged error is not manifest and is not properly before this Court. This Court should affirm Smith's conviction.

C. SMITH RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Smith's attorney provided competent and effective legal counsel throughout the course of his representation. Smith asserts his trial counsel was ineffective, if the State's evidence is insufficient to prove his voluntary intoxication defense, for failing to provide an expert witness and affirmative prove his voluntary intoxication defense. Brief of Appellant 29-34. Smith's attorney is not required to produce evidence, and a tactical trial decision does not render trial counsel ineffective in his representation of Smith simply because the tactic was not successful. Smith's claim of ineffective assistance fails

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and

extrinsic evidence outside the trial record will not be considered. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Smith's Attorney Was Not Ineffective During His Representation Of Smith Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Smith must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

An attorney's decision whether to call a witness to testify on behalf of his or her client is "a matter of legitimate trial tactics, which will not support a claim of ineffective assistance of counsel." *State v. Manschke,* 160 Wn. App. 479, 492, 251 P.3d 884 (2011), *citing State v. Byrd,* 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (internal quotations omitted). If an appellant can show his or her trial counsel failed to prepare for trial or adequately investigate then the appellant has overcome the presumption of effectiveness. *Id.* (citations omitted).

In a voluntary intoxication defense, there is no requirement that a defendant produce any evidence in order to exert the defense. *State v. Gabryschak*, 83 Wn. App. 249, 253, 921 P.2d 549 (1996). This includes long held precedent that a defendant is not required to present testimony from an expert witness that he or she was too

intoxicated to from the requisite mental state to commit the crime. *Gabryschak*, 83 Wn. App. at 253, *citing State v. Thomas,* 109 Wn.2d 222, 231, 743 P.2d 816 (1987). The defendant need not testify. *Id.*

In the present case Smith actually testified that he could not remember anything past walking in the house that evening, that he did not drink often, his general feelings towards law enforcement, and how he remembered waking up in the jail. RP 122-25. Collins' similarly testified about the state of Smith, how he did not drink very often, and how Smith's behavior was different. RP 103-105.

Smith's attorney made a tactical decision. There was a great deal of evidence, from the testimony of the officers, regarding the intoxication level of Smith. Smith's attorney was able to elicit testimony about how out of character Smith's consumption and behavior was and Smith's lack of memory of the events. A failed strategy does not rise to the level of ineffective assistance of counsel. There is nothing to show that Smith's trial counsel's performance was deficient. Therefore, Smith's ineffective assistance of counsel claim fails. This Court should affirm his conviction.

IV. CONCLUSION

The State presented sufficient evidence to sustain Smith's conviction for Assault in the Third Degree. Smith cannot raise issue with any of the jury instructions, with exception of Instruction Four, part (2a). Further, none of the instructions separately, or taken as a whole, relieve the State of its burden. Smith received effective assistance from his trial counsel, as his attorney was not required to present expert testimony regarding his intoxication. This Court should affirm Smith's conviction.

RESPECTFULLY submitted this 9th day of January, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. DALE SMITH, Appellant.	No. 48935-0-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 9, 2017, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Eugene C. Austin, attorney for appellant, at the following email addresses: Eugene.c.austin@gmail.com.

DATED this 9th day of January, 2017, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

January 09, 2017 - 3:07 PM

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